In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, and KALISPEL TRIBE OF INDIANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PUD'S REPLY TO BRIEF IN OPPOSITION

JERRY K. BOYD
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER
717 West Sprague Avenue, Suite 1200
Spokane, WA 99204-0464
(509) 455-6000

Attorney for Petitioner Public Utility District No. 1 of Pend Oreille County, Washington

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

1. The District Court And The Court Of Appeals Had No Jurisdiction To Collaterally Attack The PUD's License 2

2. *United States v. Clarke,* 445 U.S. 253 (1980) Should Be Reconsidered And Distinguished Or Overruled 6

3. The Court Of Appeals Had No Basis For Reviewing The FPC And District Court's Findings And Conclusions 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

California v. FERC, 495 U.S. 490 (1990) 3

Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 3

Escondido Mutual Water Co. v. LaJolla Bank of Mission Indians, 466 U.S. 765 (1984) 3

Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987) 6, 8

First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152 (1946) 3

FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 4

Kincaid v. Seattle, 134 Pac. 504 (Wash. 1913) *reh. den.* 135 Pac. 820 (1913) 8

Minnesota v. United States, 305 U.S. 382 (1939) 7

Ripley v. United States, 220 U.S. 491 (1911) 4

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) ...2, 3

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), *reh. den.* 312 U.S. 711 (1941) 3, 5

United States v. Clarke, 590 F.2d 765 (9th Cir. 1979) 8

United States v. Clarke, 445 U.S. 253 (1980) 1, 6, 7

STATUTES

16 U.S.C. § 791a, *et seq.* 1

16 U.S.C. § 797(e) 2

16 U.S.C. § 799 ..... 1, 2, 3

16 U.S.C. § 803(a) 2

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C. § 803(e) 4

16 U.S.C. § 818 4

16 U.S.C. § 822 ..... 2, 3

16 U.S.C. § 825*l* 2

25 U.S.C. § 357 7

25 U.S.C. § 825*l*(b) 2, 3

28 U.S.C. § 2409(a) 7

OTHER AUTHORITIES

F. Cohen, *Handbook of Federal Indian Law*, 131 (1982 ed) 7

FRAP for Ninth Circuit, Rule 30-1.2(a)(vii) and (viii) 9

IV C. Kappler, *Indian Affairs – Laws & Treaties at 1051* (Senate Document No. 53, 70th Congress, First Session, U.S. Government Printing Office (1929)) 4

INTRODUCTION

There are numerous misstatements of fact made by the court of appeals and adopted in the Brief for the United States in Opposition (U.S. Brief) and the Kalispel Indian Tribe's Brief in Opposition (Tribe's Brief). Most of these were addressed in the Petition. Public Utility District No. 1 of Pend Oreille County (PUD) will only address additional misstatements of fact by the Tribe and the United States (Government) that are material to the issues raised by the PUD's petition.[1]

The questions presented by the PUD's petition involve (1) whether the court of appeals had jurisdiction to attack, and effectively overrule, orders issued by the Federal Power Commission (FPC) now the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA) [16 U.S.C. § 791a, *et seq.*]; (2) whether the holding in *United States v. Clarke*, 445 U.S. 253 (1980) should be overruled or distinguished as inapplicable in this case; and (3) whether the court of appeals properly made "findings" which are not supported by the

---

[1] The Tribe's Brief, pp. 13 and 24, attempts to bring in extrajudicial matters in an effort to prejudice the consideration of the PUD's petition. A similar effort was rejected by the court of appeals. (Pet. App. at 122, note 7) The Tribe's Brief also misstates the substance of the correspondence with the FERC. The FERC requested that the PUD amend the "project boundary" for the project. The PUD has advised the FERC that the voluntary application to amend the project boundary by the PUD could prejudice the PUD's rights under the license. *See* FPA § 6 [16 U.S.C. § 799].

record and are inconsistent with the actual findings entered by the district court based upon the entire record.

ARGUMENT

1. The District Court And The Court Of Appeals Had No Jurisdiction To Collaterally Attack The PUD's License.

Certiorari should be granted in this case to reverse the appellate court's decision which unlawfully invades the jurisdiction and authorization which Congress delegated exclusively to the FPC and which is subject to review in an appellate court only if an aggrieved person follows the procedures prescribed by Congress in FPA § 313 [16 U.S.C. § 825*l*]. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). All issues inhering in the license are deemed to have been resolved and are not subject to subsequent *de novo* litigation. *Id.* Without review, the Government will be encouraged to attack existing FPA licenses using any basis it can conjure up, thereby upsetting the finality and certainty Congress intended a license to have under FPA § 6, § 28, § 313(b) [16 U.S.C. § 799, § 822 and § 825*l*(b), respectively].

The determination of conditions for the operation of the PUD's Box Canyon Project was within the exclusive jurisdiction of the FPC under the FPA. FPA § 4(e) and § 10(a) [16 U.S.C. § 797(e) and § 803(a), respectively]. Congress has plenary power over navigable waters and interstate commerce and has exercised its power by adopting the FPA. Congress delegated to the FPC the determinations of whether a project should be licensed

and the conditions under which such license should issue. *California v. FERC*, 495 U.S. 490, 496 (1990); *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 170-173 (1946); and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 423-427 (1940), *reh. den.* 312 U.S. 711 (1941). The licensing determinations with respect to dams on navigable rivers are legislative in character. *See United States v. Appalachian Electric Power Co.*, 311 U.S. at 423-424. The owner of riparian lands affected by a project are generally not entitled to anything for the value of the water power that can be developed using the land. 311 U.S. at 427. Determinations made by the FPC are final, subject only to judicial review pursuant to FPA § 313(b) [25 U.S.C. § 825*l*(b)]. *Tacoma v. Taxpayers of Tacoma*. The goal of Congress in passing the FPA was to encourage the development on the nation's water resources. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. at 174. The finality and certainty of the FPC's license determinations under the FPA are also supported by FPA § 6, § 28 [16 U.S.C. § 799 and § 822, respectively]. FPC decisions should be upheld if they are within the FPC's jurisdiction. *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843-845 (1984).

In their statements of the case (e.g. U.S. Brief at 4 and Tribe Brief at 7) the Government and the Tribe have assumed the very question to be decided, which is not helpful and is unpersuasive. *See Escondido Mutual Water Co. v. LaJolla Bank of Mission Indians*, 466 U.S. 765, 777 (1984). The Government and the Tribe have relied upon and adopted the misstatements of the court of appeals

with respect to Article 33 and the alleged lack of determinations under FPA § 4(e)[2] and § 10(e)[3] [16 U.S.C. § 803(e)] and the alleged bad faith of the PUD.[4] It is the PUD's contention that neither the district court nor the court of appeals had jurisdiction to review the FPC's licensing processes or orders.

The Government argues that the PUD agreed to jurisdiction of the court when the PUD argued for a declaratory judgment concerning the PUD's legal rights under the license. U.S. Brief at p. 10. *See also* Tribe's Brief at pp. 17-18. In its brief to the court of appeals, (1) the PUD was responding to the Government's and Tribe's claim for an

---

[2] The FPC's Finding (6) states that the license will not interfere or be inconsistent with the purpose for which public lands were withdrawn. Pet. App. at 61a. The Kalispel Indian Reservation was created by a 1914 Executive Order which withdrew public lands. IV C. Kappler, *Indian Affairs – Laws & Treaties at 1051* (Senate Document No. 53, 70th Congress, First Session, U.S. Government Printing Office (1929)). The FPC made a § 4(e) finding.

[3] FPA § 10(e) allegations are based upon an assumption that the lands affected by the Project were "tribal lands" in 1952 and 1963 when the license orders were issued. There is no record to support the allegation. The Commission identified the Indian lands as "allotted lands." Pet. App. at 53a. The Tribe may have purchased allotted lands after 1963. Such purchase should have no effect upon the Commission's rulings in 1952 or 1963. *See* FPA § 24 [16 U.S.C. § 818]; and *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). The effect of the purchase of allotted lands was neither presented to the district court nor the appellate court and is not ripe for review here.

[4] Pet. App. at 10a, 14a. The appellate court should not have reversed the district court's finding of good faith at Pet. App. 39a. *Ripley v. United States*, 220 U.S. 491, 496 (1911).

injunction prohibiting the PUD from occupying any Indian land; and (2) the PUD was seeking a declaration of the obvious based upon the language of the FPC's licensing orders.[5] It was the PUD's contention that so long as the PUD maintained its operations within the restrictions placed by the FPC in its orders, the PUD was not "trespassing" even though the PUD is required to pay reasonable compensation for damages to Indian lands pursuant to license Article 33, which the PUD has always been willing to do. Although the district court's decision did not affect the PUD's rights under the FPC license, the appellate court's decision substantially affected such rights.[6]

---

[5] The PUD claims the right to back water up to two feet on the Albeni Falls Project for flows of less than 90,000 CFS so long as the PUD did not cause the waters to rise above the level reached by the mean annual flood flow along the river, which includes the right to "affect" "allotted" lands in the Kalispel Indian Reservation. Pet. App. at 47a, 53a, 58a ¶ (4), 60a ¶ (7), and 72a. Neither the Government nor the Tribe has explained the inconsistency between the FPC's orders in 1952 and 1963 and the appellate court's conclusion that the PUD can't affect Indian lands in 1994.

[6] The district court's conclusion re: "trespassing" was harmless error since the district court denied the Government's and Tribe's request for an injunction and determined the compensation owed for the damages to Indian lands based on fair rental value. The court of appeals' conclusion re: "trespassing" was not harmless error since the court of appeals reversed the district court's decision with respect to injunctive relief and concluded that the PUD should pay compensation based upon power site value, which appears to be completely contrary to the holding of this Court in *United States v. Appalachian Electric Power Co.*, 311 U.S. at 427-428.

The issues which were within the jurisdiction of the district court, and therefore the court of appeals on appeal, related to the determination of the title to land and the amount of compensation to be paid for the use of or damages to Indian lands. There, the jurisdiction of the district court and the court of appeals ends.

2. *United States v. Clarke*, 445 U.S. 253 (1980) Should Be Reconsidered And Distinguished Or Overruled.

The Government argues that interpreting the license to permit the PUD to flood Indian lands would authorize unlawful "inverse condemnation" on such lands, citing *United States v. Clarke*, 445 U.S. 253 (1980). U.S. Brief at pp. 6-7 and note 2. The PUD contends that this Court should reconsider and either distinguish this case from the holding in *Clarke*, or *Clarke* should be overruled. (Pet. 27-29)

The construction given by this Court to 25 U.S.C. § 357 in *United States v. Clarke* has led to extraordinary claims, not only in this case against the PUD, but in other cases. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1443 (9th Cir. 1987). In *Etalook*, the claimant sought ejectment, quiet title to the improvements built by the Alyeska Pipeline Service Company, an accounting for the profits and an injunction barring continued trespass. 831 F.2d at 1443. In *Etalook*, the district court, awarded damage for fair rental value covering the time of occupancy prior to the formal condemnation. In addition, the *Etalook* court denied the claim for ejectment, title to the improvements placed on the lands, and punitive damages or a claim to pipeline profits. The *Etalook* court noted that where a

"trespasser" did not act in bad faith and had paid for an easement (which the PUD was always ready, willing and able to do in this case), the proper measure of damages was the reasonable rental value of the property for the duration of the "trespass." 831 F.2d at 1444. That is precisely what the district court determined in this case.[7]

It is suggested that this Court's opinion in *Clarke* is overly restrictive and is inconsistent with the intent of Congress when viewed in the context of the law. Congress enacted what is now 25 U.S.C. § 357 in 1901. 31 Stat. 1084. In 1901, the federal Indian policy was assimilation of the Indian people into the general society of the United States. One goal of assimilation was to have the same laws applied to Indians as is applied to non-Indians. F. Cohen, *Handbook of Federal Indian Law*, 131 (1982 ed).

The United States is a necessary party in a condemnation action under 25 U.S.C. § 357. *Minnesota v. United States*, 305 U.S. 382 (1939). If there is a dispute over title to the land at issue, a district court does not have jurisdiction to entertain a quiet title action to resolve such dispute with respect to lands claimed for or on behalf of Indians. 28 U.S.C. § 2409(a). Thus, a person possessing the power of eminent domain who also has claim to the Indian lands that are in dispute has no remedy to resolve the title dispute prior to an "inverse condemnation" action by the United States for damages, as occurred here.

---

[7] Findings 9 and 16, Pet. App. 37a-39a and 41a. Here, after title to the land at issue was determined, the PUD commenced a condemnation action, a fact which was taken into consideration by the district court when it denied the injunction requested by the Government and the Tribe. Finding 15, Pet. App. 41a.

Contrary to the arguments made by the Government and the Tribe, the dispute presented to the district court and the court of appeals need not result in a determination that the PUD "trespassed" on Indian lands. Rather, the case should have been resolved in the same manner as the court in *Etalook*. As in *Etalook*, the PUD commenced a condemnation action and the district court determined the PUD acted in good faith and determined the compensation that should be paid for the Indian lands at issue, which was in essence the rental value of the land. Pet. App. 37a, 41a and 45a-46a.

Here, there is the additional fact that the PUD's operation of the Box Canyon Project and its effects were analyzed and approved by the FPC in its licensing orders and provisions were made for the payment of damage in Article 33 in the license, which Article was included at the request of the Acting Secretary of the Interior. The district court determined the damages to be paid with respect to the Indian lands. The Government elected to present the issue of damages to the district court.

The PUD urges this Court to reconsider *Clarke*, where the land title is in dispute and where state eminent domain law includes "inverse condemnation" as the only remedy for a landowner. *See United States v. Clarke*, 590 F.2d 765 (9th Cir. 1979); and *Kincaid v. Seattle*, 134 Pac. 504 (Wash. 1913) *reh. den.* 135 Pac. 820 (1913).

3. The Court Of Appeals Had No Basis For Reviewing The FPC And District Court's Findings And Conclusions.

When the Government and the Tribe filed their appeals to the decision of the district court, the Government and the Tribe elected to forego filing any portion of the transcript of the proceedings before the district court. PUD's and State's Supplemental Excerpt of Record, Phase III, Vol. III, pp. 454-457 in court of appeals Nos. 88-3617, 88-3618, 88-3619, 88-3669 and 92-35504. The issues presented by the Government and Tribe to the court of appeals related to the denial of an injunction and the damages awarded by the district court. Such issues are fact-bound. The rules of the court of appeals expressly provide that where there is any challenge to the admission of evidence or where an issue on appeal challenges any other ruling, order, finding of fact or conclusion of law of the district court, the appellant is required to include, in an excerpt of record, all portions of the transcript of proceedings where there was any discussion by the court or counsel relating to the ruling of the court. FRAP for Ninth Circuit, Rule 30-1.2(a)(vii) and (viii). The PUD contends that without a record, the appellate court could not reverse the district court's decision with respect to injunctive relief or damages.

Based solely upon arguments made by the Government and the Tribe, determined that the "measure of damages for the Utility's trespass" should be based upon power site values. Pet. App. at 17a. There is no basis for such conclusion in the record. The court of appeals acknowledged that such determination is neither necessary nor required by any law or regulation applicable to

FPC decisions and that such determinations are usually made by the FPC. *Id.* This is simply another example of the appellate court's invasion of the exclusive jurisdiction and prerogatives of the FPC in violation of the FPA.

CONCLUSION

The Court should grant the PUD's petition.

RESPECTFULLY SUBMITTED this 16th day of March, 1995.

JERRY K. BOYD,
PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER
717 W. Sprague Ave., Suite 1200
Spokane, Washington 99204-0464
(509) 455-6000

Attorneys for Petitioner
Public Utility District No. 1
of Pend Oreille County,
Washington